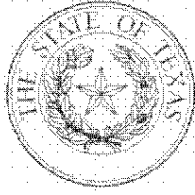


State Office of Administrative Hearings



Cathleen Parsley
Chief Administrative Law Judge

June 27, 2014

Anne Idsal, General Counsel
Texas Commission on Environmental Quality
P.O. Box 13087
Austin Texas 78711-3087

Re: **SOAH Docket No. 582-13-3283; TCEQ Docket No. 2012-1129-MSW-E; In The Matter of an Enforcement Action Against Robert Paul Evans D/B/A Terrell Sand & Recycling and Robert J. Evans, Jr. D/B/A Terrell Sand & Recycling; RN104251616**

Dear Ms. Idsal:

I serve as the State Office of Administrative Hearings (SOAH) administrative law judge (ALJ) in this matter. I have reviewed the Respondents' and the Executive Director's exceptions, as well as the Executive Director's reply to the Respondents' exceptions, and I make the following recommendations to the Texas Commission on Environmental Quality (Commission):

Executive Director's Exceptions

1. The Executive Director excepted to the recommendation in the Proposal for Decision that the Commission impose an administrative penalty of \$8,000 instead of the Executive Director's requested amount of \$11,250. As part of his exception, the Executive Director requested that Conclusion of Law No. 12 be removed and that Conclusion of Law No. 13 be renumbered and changed to reflect the \$11,250 amount.

Response: The Proposal for decision describes in detail the basis on which I recommend diminishing the proposed administrative penalty to \$8,000. That basis includes the efforts of Respondents as tenants to remediate the site, the history of the owner's creation of unauthorized the municipal waste disposal site, and the owner's solicitation of additional unauthorized municipal waste while Respondents were trying to remove the original waste piles. I recommend that the Proposal for Decision not be changed and that the exception be rejected.

2. The Executive Director identified a citation error in Conclusion of Law No. 7.

Response: I recommend that the Executive Director's proposed change be adopted to remove "Tex. Water Code § 361.011" and replace it with "Tex. Health & Safety Code § 361.011."

Respondents' Exceptions

1. Respondents excepted generally to the Proposal for Decision because, Respondents contended, the Executive Director failed to meet its burden of proof. As part of that exception, Respondents asserted that the Executive Director failed to establish the proposed findings of fact by the preponderance of the evidence.

The Executive Director's reply stated that "the overwhelming evidence supports a determination that the violation occurred as alleged."

Response: The evidence presented a set of facts about which the parties disagreed little on the sequence of events but disagreed strongly on the legal conclusions that should be drawn from the facts. The Executive Director proved the facts as shown in the Proposal for Decision by a preponderance of the evidence.

2. Respondents excepted to the Commission's alleged failure to adopt rules or statements of policy or interpretations regarding the application of 30 Texas Administrative Code § 330.15(c). The rule reads: "(c) Except as otherwise authorized by this chapter, a person may not cause, suffer, allow, or permit the dumping or disposal of MSW without the written authorization of the commission." Respondents asserted that the rule is "not valid or effective against Respondents and may not be invoked by the [Commission]"

The Executive Director's reply reviewed the Commission's history of reliance on the rule in previous enforcement proceedings.

Response: A party may not challenge an administrative rule through a contested hearing at SOAH. The terms of the Administrative Procedure Act provide a judicial process for contesting an agency's adoption of a rule. Tex. Gov't Code §§ 2001.035 and 2001.038. Respondents' challenge to the rule is not part of this proceeding and should not be considered.

3. Respondents excepted generally to the ALJ's alleged improper consideration of the Commission's rules or policies and excepted to the Executive Director's allegedly improper attempt to "influence the findings of fact or the [ALJ's] application of the law"

The Executive Director did not reply to the exception.

Response: The exception is meritless and states a potentially serious allegation of misconduct. If Respondents are alleging that an impropriety occurred during the conduct of this proceeding, they should bring the details of the matter to the attention of SOAH's Chief ALJ as soon as possible. The conduct of a SOAH ALJ is subject to a code of conduct adopted by the Chief ALJ. Tex. Gov't Code § 2003.022(d)(3). The ALJ is unaware of the Executive Director's engaging in any improper actions during this proceeding.

4. Respondent excepted generally to the following legal issues, each of which was raised, briefed, and rejected in the hearing on the merits and/or in pre- and post-hearing briefs: (1) the absence of Respondents' duty under Texas common law as tenants of a property that was the subject of an agreed final judgment; (2) the application of the doctrine of *res judicata*; (3) the chronology's failure to prove Respondents' control over the property or causing, suffering, allowing, or permitting the unauthorized disposal of municipal solid waste; (4) Respondents' objections to the Executive Director's interpretation of the provisions of 30 Texas Administrative Code § 330.15(c); (5) Respondents' disagreement about the Commission's history of interpretation of 30 Texas Administrative Code § 330.15(c); and (6) the inappropriateness and lack of consistency of the Executive Director's proposed administrative penalty of \$11,250.

The Executive Director replied to each of these assertions, relying on the same arguments asserted in the hearing on the merits and in briefs. In summary, the Executive Director contended that none of the exceptions were supported by the facts or the law.

Response: These matters are addressed in the Proposal for Decision and need not be replicated in this letter. I note that Respondents' exception to the Executive Director's proposed administrative penalty is not an amount that the ALJ recommended be adopted by the Commission.

5. Respondents asserted that the evidence did not support Finding of Fact Nos. 12, 13, 16, and 17, and Respondents requested that the findings be "vacated." The proposed findings state:

"12. While Respondents' were paying employees and vendors to clear the Property of Mr. Livingston's municipal solid waste, Mr. Livingston was continuing to solicit the unauthorized dumping of new waste."

- “13. While Respondents were leasing the Property and purchasing the Property, Mr. Livingston allowed other persons to dispose of additional municipal solid waste on the Property without a permit or Respondents’ permission or control.”
- “16. While Respondents were tenants of the Property and were contracting for the purchase of the Property, they failed to prevent the unauthorized disposal of municipal solid waste on the Property.”
- “17. Between November 2005 and February 2012, the Executive Director (ED) of the Texas Commission on Environmental Quality (Commission) issued additional investigation reports that found that Mr. Livingston, Mr. Crow, and/or Respondents had possession of the Property and failed to clear the municipal solid waste from the Property.”

Respondents assert that the proposed findings should not be adopted because: (1) no evidence in the record supports the findings of fact; (2) Mr. Livingston was not a witness at the hearing on the merits; and (3) none of the alleged facts were proved by a preponderance of the evidence.

The Executive Director replied and did not concur with the exceptions.

Response: The Proposal for Decision includes citations to the evidence of record about each of these proposed findings. The purpose for Respondents’ challenge to Finding of Fact Nos. 12 and 13 is unclear, since the proposed findings reflect a mitigating factor for the Respondents’ benefit. Finding of Fact No. 17 recites the fact that the Executive Director issued investigation reports, an evidentiary matter that is not reasonably subject to factual challenge. I recommend that the Proposal for Decision not be changed and that the exception be rejected.

6. Respondents excepted to Conclusion of Law Nos. 7, 11, and 13. The proposed conclusions state:

“7. Respondents are subject to the jurisdiction of the Commission because they operated a municipal solid waste facility. ~~Tex. Water Code~~ Health & Safety Code § 361.011.” (As revised in response to the Executive Director’s exception.)

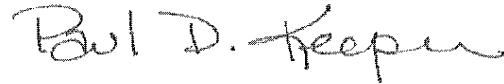
“11. Based on the above Findings of Fact, Respondent violated 30 Tex. Admin. Code § 330.15(c).

“13. Considering all the factors, the Commission should impose an administratively penalty of \$ 8,000 against Respondents.”

SOAH Docket No. 582-13-3283
TCEQ Docket No. 2012-1129-MSW-E
Exceptions Letter
June 26, 2014
Page 5

Response: For the same reasons given in response to the previous exception by Respondents, I recommend that the Proposal for Decision not be changed and that the exception be rejected.

Sincerely,

A handwritten signature in black ink that reads "Paul D. Keeper". The signature is written in a cursive, slightly slanted style.

Paul D. Keeper
Administrative Law Judge

PDK:eh
cc: Service List; Sent Via Facsimile

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TERRELL SAND & RECYCLING AND ROBERT J EVANS JR
DBA TERRELL SAND & RECYCLING
SOAH DOCKET NUMBER: 582-13-3283
REFERRING AGENCY CASE: 2012-1129-MSW-E

**STATE OFFICE OF ADMINISTRATIVE
HEARINGS**

**ADMINISTRATIVE LAW JUDGE
ALJ PAUL D. KEEPER**

REPRESENTATIVE / ADDRESS

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